Zanorain bin Abdul Latif @ Aziz v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO B-05-109 OF 1995
SHAIK DAUD, ABU MANSOR AND HAIDAR JJCA
12 MAY 1998

Criminal Procedure *— Jury — Majority verdict — Five to one verdict of guilty — Failure of trial judge to record concurrence with the verdict before conviction — Whether concurrence could be implied — Whether failure to record concurrence had prejudiced the accused — Criminal Procedure Code (FMS Cap 6) s 231*

The appellant was charged for murder and was committed to stand trial in the High Court. The trial in the High Court was before a panel of seven members of the jury, pursuant to s 200 of the Criminal Procedure Code (FMS Cap 6) ('the CPC'). In the course of the trial, one member of the jury fell ill and could not continue. The learned judicial commissioner invoked the provisions of s 211(1) of the CPC and proceeded with the trial with six members of the jury. The six members of the jury returned a five to one verdict against the appellant. Immediately thereupon, the judicial commissioner convicted the appellant and sentenced him to death, without having recorded his concurrence of the majority verdict pursuant to s 231(a) of the CPC.

Counsel for the appellant contended that pursuant to s 231 of the CPC, in the case of a majority verdict, there must be concurrence or otherwise by the learned judicial commissioner, more so in this case when the majority verdict was five to one. He contended that since the judicial commissioner failed to record his concurrence or otherwise, it had prejudiced the appellant and the verdict was a nullity. The deputy public prosecutor argued that since the judicial commissioner entered judgment immediately after the verdict, there was, therefore, no necessity for him to record the concurrence and that the judicial commissioner, by inference, had concurred with the majority verdict.

Held, allowing the appeal, quashing the conviction, setting aside the sentence and ordering a retrial:

Nowhere in s 231 of the CPC is mentioned that the concurrence or otherwise of the court ought to be recorded. However, without recording it, there is no way that the court could signify its concurrence or otherwise of the majority verdict. The fact that the judicial commissioner entered judgment immediately after the majority verdict did not necessarily mean that he concurred with the majority verdict. It may be that he felt bound to accept the verdict irrespective of whether he concurred with it or not. As in the case of a verdict of 'not

guilty' either unanimously or by a majority, the judge, by virtue of s 229 of the CPC, must record a judgment of acquittal as the question of concurrence or otherwise does not arise.

In the light of the vital distinction between a unanimous verdict and a majority verdict, the phrase 'if the court concurs' in s 231 of the CPC is a significant phrase. It is a mandatory provision and as such, it was incumbent upon the judicial commissioner in this case not only to express but also to record his concurrence or otherwise of the jury's majority verdict, more so where in this case the majority verdict was five to one. It was not sufficient for the learned judicial commissioner to comply with this mandatory provision of the law by inference. The failure to comply with the mandatory provision of the law rendered the majority verdict a nullity (see pp 763B–F, H–I and 764A).

[Bahasa Malaysia summary

Perayu dipertuduhkan dengan kesalahan membunuh dan dibicarakan di Mahkamah Tinggi. Perbicaraan di Mahkamah Tinggi adalah di hadapan panel yang terdiri daripada tujuh orang ahli juri, menurut s 200 Kanun Acara Jenayah (NMB Bab 6) ('KAJ'). Semasa perbicaraan berlangsung, seorang ahli juri telah jatuh sakit dan tidak berupaya meneruskan tugas. Pesuruhjaya kehakiman yang bijaksana mengguna peruntukan-peruntukan s 211(1) KAJ dan meneruskan perbicaraan dengan enam orang ahli juri. Enam orang ahli juri itu telah memberi keputusan lima kepada satu terhadap perayu. Dengan segera pesuruhjaya kehakiman telah menyabit perayu dan menjatuhkan hukuman mati atasnya, tanpa merekodkan persetujuan beliau dengan keputusan majoriti menurut s 231(a) KAJ.

Peguam perayu menghujahkan bahawa menurut s 231 KAJ, dalam kes keputusan majoriti, mestilah adanya persetujuan atau sebaliknya oleh pesuruhjaya kehakiman yang bijaksana, apatah lagi dalam kes ini di mana keputusan majoriti adalah lima kepada satu. Beliau berhujah bahawa oleh kerana pesuruhjaya kehakiman gagal merekodkan persetujuan beliau atau sebaliknya, ia telah memudaratkan perayu dan keputusan adalah satu pembatalan. Timbalan pendakwa raya menghujahkan bahawa memandangkan pesuruhjaya kehakiman memasukkan penghakiman dengan segera selepas keputusan, maka tiada keperluan untuk beliau merekodkan persetujuan dan bahawa secara inferens pesuruhjaya kehakiman telah bersetuju dengan keputusan majoriti.

Diputuskan, membenarkan rayuan, membatalkan sabitan, mengetepikan hukuman dan memerintahkan perbicaraan semula:

Tiada di mana-mana dalam s 231 KAJ disebut bahawa persetujuan mahkamah atau sebaliknya haruslah direkodkan. Walau

bagaimanapun, tanpa merekodkannya, tiada ikhtiar bahawa mahkamah boleh menunjukkan persetujuan atau sebaliknya dengan keputusan majoriti. Hakikat bahawa pesuruhjaya kehakiman memasukkan penghakiman dengan segera selepas keputusan majoriti tidak semestinya bermakna bahawa beliau bersetuju dengan keputusan majoriti. Adalah mungkin beliau rasa terikat menerima keputusan tanpa mengira sama ada beliau bersetuju dengannya atau tidak. Seperti dalam kes keputusan 'tidak bersalah' sama ada sebulat suara atau oleh majoriti, disebabkan s 229 KAJ, hakim mestilah merekodkan penghakiman pembebasan kerana persoalan mengenai persetujuan atau sebaliknya tidak timbul.

Memandangkan perbezaan yang penting di antara keputusan sebulat suara dan keputusan majoriti, ungkapan 'jika mahkamah bersetuju' dalam s 231 KAJ adalah ungkapan yang bermakna. Ia adalah peruntukan mandatori dan dengan itu, pesuruhjaya kehakiman dalam kes ini bukan sahaja wajib menyatakan tetapi juga merekodkan persetujuan beliau atau sebaliknya dengan keputusan majoriti juri, lebih-lebih lagi di mana dalam kes ini keputusan majoriti adalah lima kepada satu. Adalah tidak mencukupi untuk pesuruhjaya kehakiman mematuhi peruntukan undang-undang mandatori ini secara inferens. Kegagalan mematuhi peruntukan mandatori undang-undang menyebabkan keputusan majoriti menjadi satu pembatalan (lihat ms 763B–F, H–I dan 764A).]

Notes

For cases on majority verdict by a jury, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1627–1628.

Case referred to

Siew Kam Weng v PP [1989] 3 MLJ 479 (refd)
Queen v Chand Bagdee & Ors (1867) 7 WR (cr) 6 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 197, 198, 229, 200, 211(1), 231
Penal Code (FMS Cap 45) s 302

Appeal from: Criminal Trial No 45–15 of 1994 (High Court, Shah Alam)

Karpal Singh (*Karpal Singh & Co*) for the appellant.
Mohd Yusof bin Haji Zainal Abideen (Deputy Public Prosecutor) for the respondent.

Shaik Daud JCA (delivering judgment of the court): The appellant, Zanorain bin Abdul Latif @ Aziz, was convicted on 31 October 1995 in the High Court, Shah Alam for an offence of murder under s 302 of the Penal Code (FMS Cap 45) ('the Code'), and sentenced to death, after a trial with a jury. We allowed his appeal on 10 February 1998 and ordered a retrial before another judge and jury. Several grounds of appeal were put forward but Mr Karpal Singh, learned counsel for the appellant, intimated that he would proceed only on one ground, namely, that the learned judicial commissioner erred in law in not complying with the mandatory provisions of s 231 of the Criminal Procedure Code (FMS Cap 6) ('the CPC') when the jury returned a five to one majority verdict of guilty against the appellant. As this ground involves a pure question of law, we feel it would not be necessary for us to dwell on the facts of the case, especially so in view of our decision to order a retrial. It might not be amiss to mention in passing that since the amendment to the CPC by Act A908 with effect from 17 February 1995 which abolished all trials by jury and assessors, the above ground has become academic, but in the present case, as the learned Public Prosecutor has appealed to the Federal Court against our decision, we are duty bound to give our reasons thereto.

Since this appeal revolves solely on the interpretation of s 231 of the CPC, it is relevant, therefore, to examine this particular section. Section 231 of the CPC provides:

> Effect of majority verdict
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> If the verdict is guilty by a majority —
>
> (a) if the Court concurs in such verdict judgment shall be entered accordingly and the Judge shall proceed to pass sentence as prescribed in section 230;
>
> (b) if the Court does not concur in such verdict the accused person shall be tried again before another jury.

The appellant was originally charged before the magistrate on 18 April 1994 and after a preliminary enquiry which concluded on 28 April 1994, was committed to stand trial in the High Court. The trial in the High Court began on 10 October 1995 before a panel of seven members of the jury, pursuant to s 200 of the CPC. In the course of the trial on 24 October 1995, one member of the jury fell ill and could not continue. As the trial had been postponed earlier to accommodate this particular member of the jury, the learned judicial commissioner thought it fit not to postpone the trial again. He invoked the provisions of s 211(1) of the CPC and proceeded with the trial with six members of the jury. This section empowers the court, if it thinks fit, to proceed with the trial if one member of the jury for any sufficient cause is prevented from attending throughout the trial, provided that the members of the jury shall not in any case fall below six, as has happened in this case.

The trial proceeded to its conclusion on 31 October 1995, when the six members of the jury returned a five to one verdict against the appellant. Immediately thereupon, the learned judicial commissioner convicted the appellant and sentenced him to death, without having recorded his concurrence of the majority verdict pursuant to s 231(a) of the CPC.

Mr Karpal Singh contended that, pursuant to s 231 of the CPC, in the case of a majority verdict, there must be concurrence or otherwise by the learned judicial commissioner, a fortiori in this case when the majority verdict was five to one. He contended that since the learned judicial commissioner failed to record his concurrence or otherwise, it has prejudiced the appellant and the verdict is a nullity.

He cited the case of *Siew Kam Weng v PP* [1989] 3 MLJ 479 where the appellant had been tried before a jury of seven on a charge of murder under s 302 of the Code. At the conclusion of the trial, the jury found him guilty of the lesser offence of culpable homicide not amounting to murder, by a majority verdict of five to two. The trial judge was unable to concur with the majority verdict and ordered a retrial before another jury. The appellant appealed. In dismissing the appeal, the Supreme Court (at p 481) of the report made observations on the distinction between a unanimous and a majority verdict. The court observed thus:

> On the other hand, when the verdict is 'guilty' of whatever offence, the law makes a vital distinction between a unanimous and a majority verdict. If the guilty verdict is unanimous, the trial judge is obliged under s 230 to accept the plea and proceed to pass sentence. But if the guilty verdict is by a majority of not less than five to two, the law requires the trial judge under s 231 either to give or withhold his concurrence to such a verdict. In short, such a majority verdict even though by six to one or five to two is not a verdict in law unless and until the trial judge concurs with it. If he does not concur, s 231(b) comes into operation and the accused must be retried before another jury, for the simple reason that there is a deadlock between the majority of the jury and the judge, and as such there is no verdict in law.
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> The concurrence required by s 231 of the CPC is a unique provision because it purports to encroach into the province of ss 224(1) and 225 which lay down the rule that the judge determines all questions of law whilst the jury determines all questions of fact. Under s 231, the trial judge can be said to be performing the duty of a judge of facts taking over, as it were, the function of an additional juror so that when he votes with the majority decision, the verdict of the jury, though not unanimous, is recognized as a verdict in law, but if he votes against it, the verdict becomes abortive.

Therefore from this observation, it can be seen how important and imperative the concurrence of the judge is, in so far as a majority verdict of the jury is concerned.

The learned deputy public prosecutor argued that since the learned judicial commissioner entered judgment immediately after the verdict, there was, therefore, no necessity for him to record the concurrence. In other words, the learned judicial commissioner, by inference, had concurred

with the majority verdict. This argument is on the premise that s 231 of the CPC makes no mention that such concurrence or otherwise should be recorded unlike the provisions in ss 197 and 198 of the CPC, where in the case of trials with assessors, the learned judge is required to specifically record the opinion of the assessors.

Whilst it is true that nowhere in s 231 of the CPC is mentioned that the concurrence or otherwise of the court ought to be recorded but we are of the view that without recording it, there is no way that the court could signify its concurrence or otherwise of the majority verdict. It is also our view that the fact that the learned judicial commissioner entered judgment immediately after the majority verdict does not necessarily mean that he concurred with the majority verdict. It may well be that he felt bound to accept the verdict irrespective of whether he concurred with it or not. As in the case of a verdict of 'not guilty' either unanimously or by a majority, the judge, by virtue of s 229 of the CPC, must record a judgment of acquittal, as the question of concurrence or otherwise does not arise (see *Siew Kam Weng v PP*).

As for the learned deputy public prosecutor's argument on the analogy in ss 197 and 198 of the CPC, we find that such argument is misplaced. This is because the role of a judge in a trial with the aid of assessors and that of a trial by jury are vastly different. Therefore, we find no merit in this argument.

In the light of the vital distinction between a unanimous verdict and a majority verdict, we are of the view that the phrase 'if the court concurs' in s 231 of the CPC is a significant phrase and it must mean what it says and it acquired a mandatory status. We are, however, fortified in the view we took after learned counsel for the appellant referred us to Ratanlal & Dhirajlal, *The Criminal Procedure Code* (Act No V of 1898) 9th Ed, of India, in particular, to the case of *Queen v Chand Bagdee & Ors* (1867) 7 WR (cr) 6, the headnote of which reads:

> A sessions judge ought to record distinctly whether or not he agrees in the verdict of the jury.

The learned author's comment on this case at p 284 of his book (see p 33 of IAP) is as follows:

> When the verdict of the jury has been delivered, the judge is bound to say *and record* whether he agrees with the verdict or not. (Emphasis added.)

Therefore, on a true interpretation of s 231 of the CPC, we held that it is a mandatory provision and as such, it is incumbent upon the learned judicial commissioner in this case, not only to express but also to record his concurrence or otherwise of the jury's majority verdict, more so where in this case the majority verdict was five to one. In this case, the learned judicial commissioner would be performing the duty of a judge of facts also (see *Siew Kam Weng*'s case). We are of the view that it is not sufficient for the learned judicial commissioner to comply with this mandatory

provision of the law by inference. In view of the failure to comply with the mandatory provision of the law, we hold that the majority verdict is a nullity.

We allowed the appeal, quashed the conviction and set aside the sentence and ordered a retrial before another judge and jury.

Appeal allowed. Conviction quashed, sentence set aside and retrial ordered.

Reported by David Lai